ABIDIN BIN UMAR

v.

DORAISAMY A/L SUPRAMANIAM & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL SUIT NO 23-1-93 (T)]
30 DECEMBER 1993

PRACTICE & PROCEDURE: Co-defendant - Plaintiff was a passenger in co-defendant's m/lorry - Action filed against driver of the other vehicle involved in accident - Joinder of a defendant - Application by defendant to include driver of plaintiff's m/lorry as a co-defendant - Objection by plaintiff - Whether defendant can compel plaintiff to add the driver of plaintiff's m/lorry as a co-defendant - Order 15 r. 6(2)(b) RHC 1980 - Discretion of Court - Co-defendant can shed light on collision as plaintiff was asleep at the time of collision.

This was an application by the defendant under O. 15 r. 6(2)(b) of the Rules of the High Court 1980, to join as a co-defendant the driver of the motor lorry in which the plaintiff was travelling as a passenger at the time of the collision.

The sole issue in this application was whether the Court in the exercise of its discretion under O. 15 r. 6(2)(b) of the RHC 1980, and upon application of the defendant, is in a position to compel the reluctant plaintiff to add as a co-defendant the driver of the motor lorry in which the plaintiff was travelling as a passenger.

Held:

[1] The proposed co-defendant Salleh bin Ani could shed light as to whether there was in fact a collision from the rear and for this purpose it is prudent to make him a co-defendant.

[2] The proposed co-defendant Salleh bin Ani ought to be joined as a party as his presence is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon.

[Defendants's application to add driver of plaintiff's m/lorry as a co-defendant allowed. Costs in the cause to the defendant].

Cases referred to:

Hee Awa & Ors. v. Syed Muhammed Sazalay & Anor. [1988] 1 MLJ 300 SC ***(foll)***

Chan Yee v. Chan Yoke Fong [1990] 2 CLJ 737 SC ***(foll)***

Wong Kin How & Anor. v. Hayati Binti Zahari & Anor. [1992] 3 CLJ 1767 ***(refd)***

Tajjul Ariffin bin Mustafa v. Heng Cheng Hong [1991] 2 CLJ 1212 (HC) [1993] 3 CLJ 117(SC) ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 7 & 8

Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the plaintiff - Ahmad Taufiq bin Baharum; M/s Abdul Halim Said & Co.

For the defendants - V.T. Singam; M/s V.T. Singam & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

The plaintiff sued the defendants for damages arising out of an accident involving two motor lorries on 25 January 1991 at 12.30 p.m. at kilometres 17.9 Lebuhraya Changkat Jering-Ipoh. At the material time, the plaintiff was the lorry attendant of motor lorry registered as KY 9492 driven by one Salleh bin Ani that collided in the rear of the stationary motor lorry registered as R 5821. Motor lorry R 5821 was driven by the first defendant and was owned by the second defendant.

The defendants applied by way of summons-in-chambers for Salleh bin Ani to be joined as one of the defendants and for the plaintiff to amend the title to his writ by incorporating Salleh bin Ani as one of the defendants. The application was made under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 which reads as follows:

> 6(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -
>
> (b) order any of the following persons to be added as a party, namely -
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

The defendants in support of their application caused one Urshela Tharumalingam, a solicitor from Messrs V.T. Singam & Co. to affirm an affidavit wherein it was averred that the collision from the rear was caused or substantially contributed to by the negligence of Salleh bin Ani, the driver of motorlorry KY 9492. It was averred further that the particulars of the negligence of Salleh bin Ani were set out in the statement of defence and counterclaim of the defendants. It was also averred that since Salleh bin Ani contributed to the accident it was necessary that he be added as a co-defendant to enable the Court to adjudicate upon the matter effectively - "demi kepentingan keadilan". Several documents were attached and exhibited as exhibits, including the police report of the plaintiff which gave the picture that the plaintiff was asleep at the time of the accident.

The plaintiff opposed the application and caused Encik Mazlan bin Abdul Rahman, a solicitor from Messrs Abdul Halim Said & Co. to affirm an affidavit to the effect that *inter alia:*

(1) the negligence of Salleh bin Ani was not an issue in the plaintiff's claim
(2) the plaintiff intended and had elected to sue the defendants only
(3) to bring in Salleh bin Ani as a co-defendant would prejudice the plaintiff's claim and
(4) the "kepentingan keadilan" would not be affected by not incorporating Salleh bin Ani as co-defendant as all the documents were exhibited in the affidavit of Urshela Tharumalingam and such documents, whether agreed or otherwise, would be produced in the course of the trial of the civil suit.

The sole issue to be decided in the defendants' application is this: Whether the Court in the exercise of its discretion under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 and, upon the application of the defendants, is in a position to compel the reluctant plaintiff to add Salleh bin Ani as a co-defendant?

The matter seems to be settled by the Supreme Court case of *Hee Awa & Ors. v. Syed Muhammed Sazalay & Anor*. [1988] 1 MLJ 300 SC. Briefly put, the facts in *Hee Awa's* case was that there was an accident involving a motorcycle and a Government motorvan in which the pillion rider of the motorcycle was killed and the passenger in the motorvan was injured. The injured passenger claimed damages for negligence against the motorcyclist in the Sessions Court and the van driver and the Government of Malaysia were made third parties. The parents of the deceased pillion rider claimed damages under ss. 7 and 8 of the Civil Law Act 1956 in the High Court against the van driver and the Government of Malaysia. The respondent applied under O. 15 r. 6(2)(b) of the Rules of the High Court 1980, for leave to make the motorcyclist a co-defendant. The Senior Assistant Registrar dismissed the application. The High Court allowed the appeal and ordered the motorcyclist to be made a co-defendant. In dismissing the appeal, Muhammad Azmi SCJ speaking for the Supreme Court held, *inter alia:*

(1) that the respondent's application fell squarely within O. 15 r. 6(2)(b) of the Rules of the High Court 1980
(2) that the respondent had a choice to proceed either under O. 15 r. 6(2)(b) or O. 16 of the Rules of the High Court 1980
(3) that there was nothing in the Rules of the High Court 1980, to prevent the respondent from making that choice and once the choice was made that was the end of the matter
(4) that the order so made was to ensure that all matters in dispute might be effectively and completely determined and adjudicated upon as set out in O. 15 r. 6(2)(b) of the Rules of the High Court 1980 and last, but not least, that the learned Judge had exercised his discretion properly.

Some two years later the Supreme Court had occasion to consider in depth *Hee Awa's* case (*supra*), and this was in the case of *Chan Yee v. Chan Yoke Fong* [1990] 2 CLJ 737 SC. Lee Hun Hoe CJ (Borneo) (as he then was) in delivering the decision of *Chan Yee's* case agreed with the decision of *Hee Awa's* case and found that it had no reason to depart from it.

The facts in *Chan Yee's* case *(supra)* was that two motorcycles were involved in a collision resulting in the death of the pillion rider. The respondent/defendant was the rider of motorcycle AAR 7461. Lee Hoy Mun was the rider of motorcycle AAS 4483 with a pillion rider. The two motorcycles were involved in a collision resulting in the death of the pillion rider. The

appellant/plaintiff, being the father of the deceased pillion rider sued the respondent/defendant for damages for himself and his wife, the mother of the deceased pillion rider. The respondent/defendant applied by summons for leave to bring in Lee Hoy Mun as a co-defendant under O. 15 r. 6 of the Rules of the High Court 1980. It was argued before the Supreme Court, *inter alia*, that *Hee Awa's* case was decided *per incuriam*. To this, Lee Hun Hoe CJ (Borneo) speaking for and in delivering the decision of *Chan Yee's* case had this to say:

> It is necessary to bear in mind that the question before this Court in the *Hee Awa's* case was one of the true interpretation of a particular provision of RHC. We have carefully considered the judgment in that case which dealt comprehensively with the contentions of the parties. We are unable to fasten on any part of the decision under consideration and to say that there is any slip or error. If we are to accept the contention of the appellant it would necessarily make the proposition that it is open to this Court to disregard an earlier decision of its own whenever it is made to appear that the Court has not on the earlier occasion, the benefit of the best argument that the researches and industry that Counsel could provide. Such a proposition would open the floodgate to numerous and costly attempts to re-open questions which have been authoritatively decided.

Lamin J. in *Wong Kin How & Anor. v. Hayati Binti Zahari & Anor.* [1992] 3 CLJ 1767 dismissed the appeal with costs of the appellants (plaintiffs) who had appealed against the decision of the Sessions Court Judge in allowing one Lee Yew Fie to be added as third defendant on the application of the respondents (defendants). Lee Yew Fie was the driver of the motorvan involved in an accident and the second plaintiff had been a passenger in the said van. In a short judgment, his Lordship followed the Supreme Court decisions of *Hee Awa* and *Chan Yee.*

In *Tajjul Ariffin bin Mustafa v. Heng Cheng Hong* [1991] 2 CLJ 1212, KC Vohrah J. had to consider the question, on an appeal, whether the defendant, in an application for joinder of a co-defendant, can compel the plaintiff to amend the statement of claim by pleading negligence. Within a narrow compass, the facts in *Tajjul Ariffin* can be stated thus. The plaintiff who was the pillion rider on a motorcycle had sued the defendant for damages arising out of a road accident. In due course, the defendant made an application for the following prayers

(1) the joinder of the rider of the motorcycle, Lim Ah Chooi, and the owner of the motorcycle, Lim Yu Hua, as co-defendants;
(2) for the plaintiff to amend the statement of claim to add the names of Lim Ah Chooi and Lim Yu Hua;
(3) for the plaintiff to amend the statement of claim to plead negligence against Lim Ah Chooi and Lim Yu Hua;
(4) and for incidental or related matters.

The plaintiff had no objection to the defendant's application except for the application in prayer (3). The Sessions Court Judge allowed all the applications except for prayer (3) where she held that she could not compel the plaintiff to plead negligence against the intended co-defendant as this would involve substantive rather than procedural law. On appeal, K.C. Vohrah J. agreed with the Sessions Court Judge and dismissed the appeal. The case went up to the Supreme Court [1993] 1 AMR 26 pg 1119 where it was held, *inter alia*, that a plaintiff cannot be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made. But the Supreme Court in coming to this decision analysed *Hee Awa* and *Chan Yee* microscopically and drew a fine distinguishing mark when Edgar Joseph Jr SCJ said:

> It is in the light of these principles that the cases of *Hee Awa* and *Chan Yee*, should be considered. In other words, the judgment in those cases should be read in the light of the facts of those cases and not as imposing a fetter on the exercise of the discretion given to a Judge when considering an application by the defendant for joinder of a defendant, over the objections of the plaintiff, in any new case.

In another part of his judgment, Edgar Joseph Jr SCJ said:

> It follows, that if Judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the Court then, as was pointed out by Brett, M.R., in *The Friedberg* 10 p. 112, 113 they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do.

Again, in another part of his judgment, Edgar Joseph Jr. SCJ said:

> ... in so far as the power of the Court to add a defendant on the application of the

> defendant, against the wishes of the plaintiff, the jurisdiction of the Court is entirely discretionary and the only fetter which RHC O. 15 r. 6(2)(b)(ii) places upon the exercise of the discretion which it gives to the Judge of first instance, is that it shall be exercised when there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.

In short, the Supreme Court in *Tajjul Ariffin* did not fetter the discretionary power of the Court of first instance to add a co-defendant upon the application of the defendant against the wishes of the plaintiff.

Now, in the application before me (it is pertinent to note that there is no prayer No. (3) like *Tajjul Ariffin),* I need to consider, whether Salleh bin Ani as the proposed co-defendant was wholly or partly responsible for the accident? From the statement of claim, it was averred that the accident occurred as a result of the negligence or contributory negligence of the defendants. The particulars of the defendants' negligence were itemised, the relevant portions being:

(d) menyebabkan plaintif berada dalam keadaan penuh kecemasan dan tidak mempunyai peluang untuk mengelakkan kemalangan tersebut;

(f) tidak memberikan plaintif peluang untuk mengelak daripada perlanggaran;

(g) meletakkan plaintif di dalam keadaan penuh kecemasan tanpa memberikan peluang apa-apapun untuk mengelakkan daripada pelanggaran tersebut di atas;

(h) mengetahui akan kehadiran kenderaan atau plaintif di belakangnya tetapi masih gagal untuk memberi sebarang amaran ataupun isyarat sewaktu memberhentikan moto-lorinya menyebabkan mustahil bagi plaintif mengelakkan kemalangan tersebut;

(i) tidak meletakkan sebarang tanda semasa meletakkan atau memberhentikan motor-lorinya di atas jalan dalam keadaan cuaca gelam (kelam);

(m) dengan tiba-tiba dan tanpa sebarang amaran berhenti di atas jalan plaintif;

(o) menyebabkan satu kemalangan di hadapan plaintif dengan secara tiba-tiba;

(p) gagal mempunyai apa-apa atau apa-apa penunjuk yang betul;

(q) gagal untuk menunjukkan apa-apa atau apa penunjuk yang betul;

(r) gagal memasang lampu signal motor-lorinya;

(s) gagal untuk berhenti di tepi jalan;

(t) berhenti di atas jalan sewaktu ianya bahaya dan tidak selamat berbuat demikian; dan

(u) memandu dengan tiada sebarang timbangrasa terhadap pengguna jalan khasnya plaintif.

Bearing in mind that at the material time of the accident, the plaintiff as a lorry attendant of motorlorry KY 9492 was asleep, how could he possibly have coughed up the particulars of negligence against the defendants, in particular against the first defendant? What actually happened to motorlorry KY 9492 can only be narrated by the driver of that motorlorry, viz, Salleh bin Ani. The plaintiff was not in a position to describe the movements of motorlorry KY 9492 nor that of motorlorry R 5821 before the accident. How could he? Being fast asleep, it boggles the mind to read the particulars of negligence of the defendants as alleged by the plaintiff.

The pleadings clearly showed that the accident happened as a result of a collision from the rear. It is now trite law that a following driver should take up such a position and drive in such a fashion as will enable him to deal with all traffic exigencies. This aspect of the case can only be extracted from Salleh bin Ani. Even the defendants in their statement of defence and counter-claim averred positively the role played by Salleh bin Ani. Consequently, on a reasonable and probable basis, I am of the considered view that Salleh bin Ani as the proposed co-defendant, could shed light as to whether there was in fact a collision from the rear and for this purpose it is prudent to make him a co-defendant.

It is germane, at this juncture, to quote a passage of the judgment of Edgar Joseph Jr SCJ in *Tajjul Ariffin* to the following effect

> ... the objects of para (2)(b)(ii) as to joinder of parties are generally speaking the same as the objects of the Rules governing third party proceedings, that is to say
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> (1) to prevent multiplicity of proceedings and to enable the Court to determine disputes between all parties to them in one action, and
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> (2) to prevent the same or substantially the same questions or issues being tried

all over again with possibly different results (see **Supreme Court Practice, 1991,** para 15/6/7, p. 193).

Alternatively, I am of the considered view that Salleh bin Ani ought to be joined as a party as his presence is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. Only Salleh bin Ani knew what happened that night when he drove the "sleeping plaintiff" in motorlorry KY 9492.

Accordingly, I order that Salleh bin Ani be joined as a co-defendant and the plaintiff to amend the title to his writ by incorporating Salleh bin Ani as one of the defendants. Costs in the cause to the defendants.

Order accordingly.